Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

WILLIAM P. MONAHAN, PETITIONER

v.

WILLARD MITT ROMNEY, INDIVIDUALLY AND AS HE IS GOVERNOR OF THE COMMONWEALTH OF MASSACHUSETTS; ERIC FEHRNSTROM; NICHOLAS TZITSON; SHAWN FEDDEMAN; AND SPENCER ZWICK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where respondents' "purely coercive" conduct forced petitioner to resign as Chairman of the Massachusetts Civil Service Commission, has he been deprived of his property interest in continued employment without due process of law?

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The published opinion of the Court of Appeals for the First Circuit in *William P. Monahan v. Willard Mitt Romney et al.*, C.A. No. 09-2458, dated November 3, 2010, and reported at 625 F.3rd 42 (1st Cir. 2010), affirming the District Court's entry of judgment in favor of respondents, is set forth in the Appendix hereto. (App. 1-12).

The unpublished opinion of the District Court for the District of Massachusetts in *William P. Monahan v. Willard Mitt Romney et al.*, C.A. No. 06cv10921-NG, dated September 3, 2009, ruling that respondents were not liable for violating petitioner's rights under the federal constitution, is set forth in the Appendix hereto. (App. 13-47).

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit affirming the District Court entry of judgment in favor of the respondents was entered on November 3, 2010(App. 1-12).

On January 24, 2011, this Court, Breyer, J., granted petitioner's application for an extension of time to file his petition until April 2, 2011 (Docket No. 10A729).

This petition for writ of certiorari is filed within the time allowed by Justice Breyer's order permitting petitioner to file his petition by April 2, 2011.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment XIV, § 1:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law....

28 U.S.C. § 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343(a)(4):

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> ...
>
> (3) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights.....

Civil Rights Act–42 U.S.C. § 1983:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Massachusetts Gen. Laws, c. 7, § 4I:

Civil service commission; members; chairman; appointment; tenure; political party restriction; compensation.

[First paragraph effective until July 31, 2003. For text effective July 31, 2003, see below.]

There shall be within the executive office for administration and finance, but not under its supervision or control, a commission to be known as the civil service commission, consisting of five members, one of whom because of vocation, employment, occupation or affiliation, can be classified as a bona fide representative of labor.

[First paragraph as amended by 2003, 46, Sec. 4, effective July 31, 2003. For text effective until July 31, 2003, see above.]

There shall be within the executive office for administration and finance, but not under its supervision or control, a commission to be known as the civil service commission, consisting of five members, one of whom

because of vocation, employment, occupation or affiliation, can be classified as a bona fide representative of labor and 2 of whom shall have prior experience serving as a town administrator, city manager, selectman or city councilor. Upon the expiration of the term of office of a commissioner of the civil service commission, his successor shall be appointed by the governor for five years; provided, however, that if such successor is not appointed within sixty days of the expiration of the term of office of a commissioner, the said commissioner shall be deemed to be reappointed to a full term. Not more than three of such members of said commission shall be members of the same political party, and, of the members of said commission who are enrolled as members of a political party on the voting list used at the primaries, not more than a majority of such members shall be of the same political party. The governor shall, from time to time, designate one of the members as chairman. The positions of chairman and each other member of the commission shall be classified in accordance with section forty-five of chapter thirty and the salaries shall be determined in accordance with section forty-six C of said chapter thirty. The commissioners shall receive their travel and other necessary expenses incurred in attending meetings. Meetings of the commission shall be held at such time and location as it may determine and the commission shall meet upon the request of the personnel administrator. The commission shall in its rules of practice and procedure provide for the conduct of hearings

throughout the commonwealth when it would best serve the interested parties. Said commission or any member thereof, or the personnel administrator, may require in connection with the activities authorized by law any official or employee of the human resources division to give full information and to provide all papers and records relating to any official act performed by him.

Massachusetts Gen. Laws, c. 30, § 9:

Public officers appointed by governor; removal. Unless some other mode of removal is provided by law, a public officer, if appointed by the governor, may at any time be removed by him for cause, and, if appointed by him with the advice and consent of the council, may be so removed with its advice and consent.

Massachusetts Gen. Laws, c. 41, § 109:

Resignation; notice; residence requirements. No resignation of a town or district officer shall be deemed effective unless and until such resignation is filed with the town or district clerk or such later time certain as may be specified in such resignation. Upon receipt of a resignation the clerk shall notify the remaining members, if the resignation is received from a board of two or more members, and he shall further notify the executive officers of the town or district and such notification shall include the effective date of the resignation. Unless otherwise provided by general or special law, ordinance or by-law, a

person need not, in order to accept appointment to a public office in a town or district, be a resident of such town or district; provided, however, that if an appointed town or district officer is required to become a resident within a period of time specified at the time of his appointment by the board or officer making the appointment but fails to do so within the time specified, or if an elected or appointed town or district officer removes from the town or district in which he holds his office, he shall be deemed to have vacated his office.

Massachusetts Gen. Laws, c. 231A, § 1:

The supreme judicial court, the superior court, the land court and the probate courts, within their respective jurisdictions, may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is specifically set forth in the pleadings and whether any consequential judgment or relief is or could be claimed at law or in equity or not; and such proceeding shall not be open to objection on the ground that a merely declaratory judgment or decree is sought thereby and such declaration, when made, shall have the force and effect of a final judgment or decree and be reviewable as such; provided, that nothing contained herein shall be construed to authorize the change, extension or alteration of the law regulating the method of obtaining

service on, or jurisdiction over, parties or affect their right to trial by jury. When a declaration of right, or the granting of further relief based thereon, shall involve the determination of issues of fact triable by a jury as of right and as to which a jury trial is duly claimed by the party entitled thereto, or issues which the court, in accordance with the practice of courts of equity, considers should be tried by a jury, such issues may be submitted to a jury in the form of questions, with proper instructions by the court, whether a general verdict be required or not.

Massachusetts Gen. Laws, c. 249, § 4:

[Text of section effective until February 20, 2007.]

A civil action in the nature of certiorari to correct errors in proceedings which are not according to the course of the common law, which proceedings are not otherwise reviewable by motion or by appeal, may be brought in the supreme judicial or superior court or, if the matter involves any right, title or interest in land, or arises under or involves the subdivision control law, the zoning act or municipal zoning, or subdivision ordinances, by-laws or regulations, in the land court. Such action shall be commenced within sixty days next after the proceeding complained of. Where such an action is brought against a body or officer exercising judicial or quasi judicial functions to prevent the body or officer from proceeding in favor of another party, or is brought with relation to

> proceedings already taken, such other party may be joined as a party defendant by the plaintiff or on motion of the defendant body or officer or by application to intervene. Such other party may file a separate answer or adopt the pleadings of the body or officer. The court may at any time after the commencement of the action issue an injunction and order the record of the proceedings complained of brought before it. The court may enter judgment quashing or affirming such proceedings or such other judgment as justice may require.

Massachusetts Gen. Laws, c. 249, § 5:

> A civil action to obtain relief formerly available by writ of mandamus may be brought in the supreme judicial or superior court.

Massachusetts Gen. Laws, c. 249, § 9:

> The supreme judicial and superior courts shall have like jurisdiction of civil action s brought by the attorney general against a person holding or claiming the right to hold an office or employment, the salary or compensation of which is payable by the commonwealth, a county, city or town.

STATEMENT

On July 18, 2003, respondent Willard Mitt Romney ("respondent" or "Romney"), as the Governor of the Commonwealth of Massachusetts, appointed petitioner William P. Monahan ("petitioner" or

"Monahan") Chairman of the Massachusetts Civil Service Commission. (App. 2;15). By statute (Mass. G. L. c. 7, § 41) , the term of petitioner's employment was for a period of five (5) years and because he was replacing a commissioner who had just begun his appointment, petitioner was to serve the remaining 4.8 years of that 5-year term. (App. 2; 42). His annual salary was $82,000. (App. 15)

As a public officer appointed under Mass. G. L. c. 7, § 4I, petitioner was guaranteed his position by law unless he was removed by Romney for cause. (App. 2; 15). As Mass. G. L. c. 30, § 9, provides,

> [u]nless some other mode of removal is provided by law, a public officer, if appointed by the governor, may at any time be removed by him for cause, and, if appointed by him with the advice and consent of the [Governor's] [C]ouncil, may be so removed with its advice and consent.

(App. 15). At the time of his appointment, petitioner was sixty-nine (69) years of age, having given up his law practice because of a heart condition. (*Id.*). However, he had considerable experience in local politics and community relations, having served as a Selectman for the Town of Belmont, Massachusetts for twenty (20) years. (*Id.*). He had also worked for Tufts New England Medical Center as its Director of Community Services from 1970 to 1990 and during this same period he was an Associate Clinical Professor at the Tufts University School of Medicine. (*Id.*).

Petitioner and Romney had come to know each other as Belmont neighbors and as a result of

petitioner's official responsibilities in the town. (*Id.*). They had worked together on a project to build a Mormon church in Belmont and petitioner supported Romney in his bid for the United States Senate. (*Id.*).

The application which petitioner completed to become Chairman of the Massachusetts Civil Service Commission sought background information about his employment and work history in order to identify such things as whether there had been any proceedings instituted against him by the Massachusetts Ethics Commission, whether there were any tax delinquencies, pending litigation against him, etc. (App. 2;16). One of the questions asked petitioner: "Is there any other information or potential conflicts that you feel should be known to us prior to the appointment?" (*Id.*). Petitioner answered this question "No." (*Id.*).

Petitioner began work on August 1, 2003. (App. 16). About four weeks later, shortly after 5:00 P.M. on Thursday, August 28, 2003, petitioner received a phone call while at work from Frank Phillips, a reporter with the *Boston Globe*. (App. 2-3;16). Phillips asked petitioner about his purchase with another man in 1980----23 years earlier----of property located at 253 Tremont Street in Boston. (*Id.*). In1980, petitioner and one Dominic Paulo purchased a building at this address from Huntington Realty Co., a business owned by Gennaro Angiulo who was a reported leader of organized crime in Boston. (App. 3;16-17). Petitioner explained to Phillips that this singular transaction was an arm's length one, a completely legal purchase of real estate for its fair market price with a lawful rate of interest which was duly recorded in the registry of

deeds and that he sold off his part interest in the property in 1992. (App. 3;17).

This 1980 purchase of real estate by petitioner was brought up in 1992 when petitioner was a town selectman, used by his rivals to suggest that he was a "member of the mafia or being paid by the mafia." (App. 17). Petitioner even appeared on a local cable news program to answer questions about it and explain that this singular transaction was an entirely arms-length one, a completely legal purchase of real estate for its fair market price which was duly recorded and that he sold off his part interest in the property in 1992. (*Id.*). Notwithstanding this issue, petitioner was elected as town selectman a number of times after it was raised; and petitioner assumed that because Romney had already heard about this entirely legal1980 transaction years earlier----and because it was so far in the past----he did not believe that it was the kind of issue which needed to disclose in his application for his civil service position. (*Id.*).

After speaking with petitioner, Phillips called respondent Shawn Feddeman ("Feddeman"), Romney's Press Secretary, to discuss the transaction and his upcoming story about it in the *Boston Globe* the next day. (App. 3). In the meantime, petitioner left his office and arrived home at about 6:10 P.M. (App. 3;18). Feddeman and respondent Eric Fehrnstrom ("Fehrnstrom"), Romney's Communications Director, had already called petitioner's home and told his wife that he should stand by for another call. Feddeman and Fehrnstrom then called respondent Spencer Zwick ("Zwick"), Romney's Chief of Staff, to discuss the impending *Boston Globe* story and to confirm

petitioner's appointment to the Civil Service Commission. They also called respondent Nicholas Tzitzon ("Tzitzon"), Romney's Director of Appointments, to inquire whether petitioner had disclosed the1980 transaction on his application.

Feddeman and Fehrnstrom then called petitioner back at 6:17 P.M. (App. 3;18). According to petitioner, Feddeman and Fehrnstrom asked him about the 1980 transaction and both told him in raised voices that whether it was an arm's length transaction or not, it was embarrassing to Romney and he must resign so that Phillips' impending report would be "a one-day story." (App. 3;18-19). Petitioner responded that he would not resign, that the story had been well vetted "a dozen years ago;" and that he wanted to speak to Romney about it. (App. 3;18-19). Feddeman and Fehrnstrom remember a different conversation wherein they merely asked petitioner about the transaction and why he had not reported it on his job application, with no resignation even being discussed. (App. 3-4;19). This phone call lasted nine minutes and six seconds.

Fehrnstrom and Zwick then called Romney. (App. 4;19-20). Romney believed that this1980 real estate transaction----a legal one in every respect---- somehow compromised petitioner's present ability to fulfill his duties as Chairman of the Civil Service Commission. (App. 4;20). Romney "decided that [petitioner] should be given an opportunity to resign and, if he did not, [Romney] would remove him." (App. 4;20). Zwick was delegated to call petitioner back and accept his resignation on Romney's behalf. (*Id.*).

Zwick, Fehrnstrom and Tzitzon called petitioner back at 6:52 P.M., just twenty-five (25) minutes after their last phone conversation with him, with the sole purpose of obtaining petitioner's oral or written resignation. (App. 4;20-21). As Fehrnstrom later testified, there was no "Plan B" if petitioner did not agree to resign; "the plan was to obtain [petitioner's] voluntary resignation." (J.A. 258-259). According to petitioner, Zwick told him he had to "take one for the team" and resign in order to mute negative publicity of the impending *Boston Globe* story the next day. (App. 4;20-21). Petitioner replied that he would resign if he thought it was in Romney's best interests or in his best interests—but he did not think this was the case. (App. 21). Zwick repeated his demand that petitioner resign and he gave petitioner his fax number so that he could fax Zwick his written resignation. (App. 21).

Respondents Fehrnstrom and Zwick had a different view of this second phone conversation. (App. 4-5;21-22). Fehrnstrom could not remember petitioner's exact words but he thought that by the end of the call, petitioner had agreed to resign and that Zwick then communicated Romney's acceptance of his resignation. (App. 5;21). Zwick could not remember petitioner's exact words either but he too claimed that petitioner "had resigned." (App. 21). Tzitzon (who was listening in on the conversation) also claimed that petitioner "said he would in fact resign." (App. 5;21).

Armed with this consensus among themselves that petitioner had agreed to resign, Fehrnstrom, Zwick and Tzitzon had Feddeman call Phillips of the *Boston Globe* to inform him that petitioner had resigned and that Romney had accepted his

resignation. (App. 5;22). Zwick called Romney to inform him of petitioner's resignation. (*Id.*).

At 8:15 P.M. the same evening of August 28, 2003, Romney called petitioner. (App. 5;22). Petitioner recalls the conversation as one wherein he reiterated his refusal to resign over an entirely legal and arm's length transaction over 23 years ago, one long since vetted, and that this matter was not about his job but about his good name and reputation. (App. 22-23). Romney told him to "think it over" and that he would help petitioner obtain a job in the private sector. (App. 6;23). Romney gave him Zwick's phone number and said Zwick would find him if petitioner wanted to talk further. (*Id.*).

Romney remembered his conversation with petitioner as one expressing his appreciation to petitioner for "having resigned;" and he offered to help petitioner find another position in the private sector. (App. 23-24). He did not ask for petitioner's resignation during this phone call since he had been told by his senior staff that petitioner had already agreed to resign. (App. 23). He thought that this call was one involving "a full discussion" of the circumstances surrounding this real estate transaction rather than an examination of the reasons why petitioner would not resign. (App. 5-6;23).

The next day, Friday, August 29, 2003, the *Boston Globe* published Frank Phillips' story about the 1980 transaction as well as petitioner's resignation. (App. 6;24). Petitioner went to work although his parking pass was no longer valid. (*Id.*). Tzitzon called petitioner and asked why he had not faxed his

resignation. (*Id.*). Petitioner replied that he was not planning to resign; Tzitzon remembers no such statement, instead that petitioner stated he was having problems with his printer. (*Id.*).

The next day, Saturday, August 30, 2003, petitioner's friend and attorney (Joseph Brodigan, Esq.) called Zwick and told him that petitioner would *not* be resigning. (*Id.*). On the following Tuesday, September 2, 2003, the next business day, petitioner again went to work but then left pursuant to an agreement between his counsel and Romney that his leaving would not be interpreted as a resignation. (App. 6-7;24). He never returned to the Civil Service Commission and Romney's legal counsel thereafter wrote petitioner's counsel confirming the Romney administration's position that Romney had accepted had accepted petitioner's oral resignation submitted on Thursday, August 28, 2003. (App. 6-7;24). A week later, petitioner submitted a position paper to Romney's legal counsel asserting that he came to the conclusion that he would not resign on Friday, August 29, 2003. (App. 7;24-25).

Because respondents asserted that petitioner voluntarily resigned his position as Chairman of the Massachusetts Civil Service Commission, he was not offered a post-termination hearing with Romney. (App. 26). Romney later appointed John Guerin to petitioner's position on the Commission and he was to begin serving in January of 2004. (*Id.*). Before Guerin took office, petitioner filed suit against him in the Middlesex Division of the Superior Court Department to enjoin him from occupying petitioner's position. (*Id.*). A preliminary injunction was denied petitioner on

January 27, 2004 (*Monahan v. Guerin*, Docket No. MICV 2004-0195-B). (*Id.*). Petitioner did not pursue this civil action and it was ultimately dismissed. (*Id.*).

On May 25, 2006, petitioner brought this civil rights action against respondents in the federal district court for the District of Massachusetts under 42 U.S.C. § 1983 *et seq.* Positing federal jurisdiction on 28 U.S.C. §§ 1331;1343(a)(3) & (4), petitioner claimed in seven counts that respondents under color of State law had unconstitutionally removed him from his office as Chairman of the Massachusetts Civil Service Commission by coercing him into resigning, thereby depriving him of protected property and liberty interests without due process of law. (App. 1;13; 26-27). The gist of petitioner's contention was that he never resigned and therefore was owed due process in order to establish whether Romney had "cause" within Mass. G. L. c. 30, § 9, to remove him. (App. 13). Respondents, on the other hand, argued that petitioner orally resigned, that they accepted it and that, as such, petitioner was owed no additional process. (App. 13).

A four-day bench trial ensued in the district court before Gertner, J. (App. 1-2; 14). On September 3, 2009, the district judge issued her findings of fact and conclusions of law. (App. 13-47). Measuring the evidence already recited in this petition against the five-factor test of *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 167, 173-174 (4th Cir. 1988) for determining whether an employee's resignation is coerced and therefore involuntary, the district judge found that petitioner's resignation was actually tendered on Thursday, August, 28, 2003, and was voluntary. (App. 29-33). As she viewed the

evidence, petitioner-----in just 25 minutes----was given the opportunity to a make a free choice whether to resign or risk a removal proceeding by Romney for cause under Mass. G.L., c. 30, § 9. (App. 30-31). Moreover, she found that petitioner understood the nature of the choice he was given; he was a lawyer who understood "that he was under no obligation to resign and had he power to reject the [respondents'] request that he do so." (App. 31-32).

Addressing *Stone's* other factors, the district court noted that petitioner was given less than one half hour between respondents' first phone conversation and their second one to decide whether to resign and that he had no time to seek the advice of counsel. (App. 30; 32). However, it concluded that petitioner was not confined to a room during this time, the request to resign was made by phone rather than in person and he had access to his wife and friends for this brief period. (App. 32-33). That petitioner was *not* permitted to select the effective date of his resignation----another factor in *Stone's* analysis----was never addressed by the district judge. (App. 30;32-33).

Even if petitioner did not voluntarily resign, Judge Gertner determined that respondents furnished him adequate due process in that the phone conversations he had with respondents and Romney himself on the evening of August 28, 2003, were sufficient *pre*-termination process to pass constitutional muster. (App. 34-35). That is, the trial judge assumed for the purposes of this analysis that petitioner was actually terminated *on Tuesday, September 2, 2003*, and therefore the phone conversations he had with

respondents on Thursday, August 28, 2003, constituted adequate pre-termination process. (App. 34-35;46).

As the district judge concluded, petitioner "was placed on notice of the charges against him during his initial conversation with [respondents] Fehrnstrom and Feddeman, and he subsequently received two 'hearings' regarding his contemplated termination----one at approximately 6:52 p.m. with Zwick, Fehrnstrom and Tzitzon, and the other at approximately 8:15 p.m. with the Governor himself." (App. 34-35). Even though these phone conversations were admittedly brief and informal, the district judge thought they were adequate pre-termination process given the extensive *post*-termination process afforded petitioner under state law. (App. 35).

As for the process furnished petitioner post-termination, the trial judge determined that petitioner "had failed to demonstrate that the post-deprivation remedies afforded by Massachusetts law-----including certiorari, mandamus and declaratory judgment-----are inadequate to satisfy the requirements of the Due Process Clause." (App. 38). In fact, the court made note of the fact that petitioner actually invoked one of these state remedies by bringing a civil action seeking to enjoin his successor from assuming his position (*Monahan v. Guerin*, Docket No. MICV 2004-0195-B), and that he failed to prosecute this case after his motion for a preliminary injunction was denied. (App. 38).

Finally, Judge Gertner concluded that even if these state remedies were constitutionally insufficient, respondents were nonetheless entitled to qualified immunity because "the unavailability

or inadequacy of these remedies was not 'clearly established' at the time [petitioner] was removed from office." (App. 38-39). That is, no reasonable official in the respondents' position, having understood petitioner to have effectively waived his rights to pursue any action by failing to take advantage of available statutory remedies, would expect that any further action was constitutionally required. (App. 39).

For some of the same reasons, respondents had not without due process deprived petitioner of his liberty interest in retaining his employment free of false and defamatory media reports and rumors. (App. 39-41). As the trial court concluded, petitioner did not prove that respondents failed to provide him with an adequate chance to clear his name because petitioner "was afforded three opportunities to discuss the allegations in the *Globe* article with members of Governor Romney's staff and with Governor Romney himself on the evening of August 28, 2003." (App. 41).

After judgment entered on all counts for respondents in the district court, petitioner appealed and the court of appeals unanimously affirmed the district judge. (App. 1-12). It determined that the trial judge's view of the evidence was supported, that she could believe respondents' version of the three phone calls rather than petitioner's version, that no issue of law was presented by the appeal and that because petitioner's resignation was voluntary, his claims of deprivation of his protected property and liberty interests under the Due Process clause "necessarily fail[]." (App. 7-10).

On January 28, 2011, this Court, Breyer, J., granted petitioner's application for an extension of time to file his petition until April 2, 2011 (Docket No. 10A729). Petitioner now brings his petition seeking a writ of certiorari to the United States Court of Appeals for the First Circuit.

REASONS FOR GRANTING THE PETITION

Respondents' "Purely Coercive" Conduct Forced Petitioner To Resign As Chairman Of The State's Civil Service Commission And Deprived Him Of His Property Interest In Continued Employment Without Due Process Of Law.

There is no dispute that petitioner has a property interest in his continued employment as Chairman of the Massachusetts Civil Service Commission to the extent of his five-year term because as a public officer appointed by the Governor under Mass. G. L. c. 7, § 41, petitioner was protected against arbitrary dismissal and was guaranteed his position by law unless he was removed by Romney for cause pursuant to Mass. G. L. c. 30, § 9. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 538 (1985). *Board of Regents v. Roth*, 408 U.S. 564, 576-578 (1972).

Significantly, petitioner's five-year term exceeds the Governor's term of office. The Civil Service Commission, although placed within the Department of Administration and Finance in the executive branch, is not under Romney's supervision or control; it is primarily an administrative adjudicatory body. See Mass. G. L. c. 31, § 2. Thus a commissioner like petitioner is *not* a political appointee; he does *not* serve

at the pleasure of the Governor; his removal must be for cause; and the members of the Civil Service Commission----including petitioner—are *not* subject to executive supervision or control but rather perform quasi-judicial functions.

Because he possessed a property right in his continued employment, petitioner is also entitled to the protection of the Fourteenth Amendment's due process clause when some form of "state action" deprives him of this right through termination. *Loudermill*, *supra*. The process due petitioner consists of a pre-deprivation hearing together with a "full" post-deprivation hearing. 470 U.S. at 545. The pre-deprivation hearing need not be elaborate as long as it checks against mistaken decisions; it consists of providing petitioner oral or written notice of the charges, an explanation of the employer's evidence and an opportunity for petitioner to explain his side of the story. *Id.* at 543-546. *Gilbert v. Homar*, 520 U.S. 924, 929 (1997). In *Loudermill*, this is the constitutional minima of due process for a pre-deprivation hearing, given that Ohio law provided the petitioner there with a timely, full post-termination hearing where he could adduce and rebut evidence, engage in discovery, cross examine witnesses, etc., thus satisfying the Court's notion that due process requires a hearing "at a meaningful time and in a meaningful manner." *Id.* at 546-547 & 549-551; 553-554 (Marshall, J., concurring; Brennan, J., concurring and dissenting in part).

If, however, petitioner resigns from his propertied employment through his own free will even though prompted to do so by events set in motion by state actors, he has relinquished his property interest

voluntarily and therefore cannot establish that respondents deprived him of it within the meaning of the due process clause. *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 167, 173 (4th Cir. 1988). See *Martinez v. California*, 444 U.S. 277, 281 (1980). If, on the other hand, petitioner's "resignation" was so involuntary that it amounted to a constructive discharge, it must be considered a deprivation by state action triggering the protections of the due process clause. *Stone*, *supra*. *Cf. Pennsylvania State Police v. Suders*, 542 U.S. 129, 141 (2004) (the concept of constructive discharge was originally developed by the National Labor Relations Board to address situations where employers coerced employees to resign). As the court of appeals in *Stone* observed, "[a] public employer obviously cannot avoid its constitutional obligation to provide due process by the simple expedient of forcing involuntary 'resignations.'" *Id.*

Respondents' "Purely Coercive" Conduct Forced Petitioner's Resignation.

In the wake of the Fourth Circuit's decision in *Stone*, the Third, Eighth, Ninth, Tenth and Eleventh Circuits have adopted a "duress or coercion" theory under which a resignation may be found involuntary, if, from the totality of the circumstances, it appears the employer's conduct in "requesting" or obtaining the resignation, effectively deprived the employee of free choice in the matter. *Knappenberger v. City of Phoenix*, 566 F.3d 936, 941 (9th Cir. 2008). *Leheny v. City of Pittsburgh*, 183 F.3d 220, 227-228 (3rd Cir. 1999). *Hargray v. City of Hallandale*, 57 F.3d 1560, 1568 (11th Cir. 1995) (*per curiam*). *Angarita v. St. Louis County*,

981 F.2d 1537, 1544 (8th Cir. 1992). *Parker v. Bd. of Regents*, 981 F.2d 1159, 1162 (10th Cir. 1992).

The amalgam of factors which these Circuits have consistently relied upon in measuring whether duress or coercion took place in order to force a resignation and thereby avoid due process protections are: (1) whether the employee was given some alternative to resignation; (2) whether the employee understood the nature of the choice he was given; (3) whether the employee was given a reasonable time in which to choose; (4) whether the employee was permitted to select the time of resignation; and (5) whether the employee had the advice of counsel. See *Hargray*, 57 F.3rd at 1568; *Angarita*, 981 F.2d at 1544; *Parker*, 981 F.2d at 1162; *Stone*, 855 F.2d at 174.

The first factor is the most important because it goes to the heart of the employee's exercise of free choice, *Stone*, 855 F.2d at 174, and it is the one which both the district court and the court of appeals fundamentally mishandled on this record. The district judge concluded that respondents gave petitioner an alternative to resignation, i.e., removal for cause under Mass. G. L. c. 30, § 9. Repeating the observation of *Stone* and other courts of appeals, she then determined that while this choice was not an attractive one, it nevertheless did not establish that his resignation was involuntary because petitioner still had a choice, he could "stand pat and fight." (App. 30 citing *Parker*, *supra*). *Accord*, *Hargray*, *supra*; *Stone*, *supra*; *Christie v. United States*, 518 F.2d 584, 587-588 (Ct. Cl. 1975).

However, as all these courts of appeals make clear----and as the district judge herself acknowledged

(App. 30)----there is an exception to this rule about identifying the choice available to petitioner, i.e, the rule does *not* apply when the employer lacks good cause to believe that there were grounds for termination at the time the alternatives were offered to the employee. Stated another way, if the employer knows or believes that the reasons for the proposed termination could not be substantiated, the threatened action "is purely coercive." *Schultz v. United States Navy*, 810 F.2d 1133, 1136-1137 (Fed. Cir. 1987). *Accord, Parker, supra; Stone, supra; Christie, supra; Cosby v. United States*, 417 F.2d 1345, 1355 (Ct. Cl. 1969); *Autera v. United States*, 389 F.2d 815, 817 (Ct. Cl. 1968); *Rich v. Mitchell*, 273 F.2d 78, 79 (D.C. Cir. 1959), *cert. denied*, 368 U.S.854 (1961).

The district court thought that there was an "arguable basis" for concluding that Romney could remove petitioner for cause under Mass. G. L. c. 30, § 9, for his entirely legal purchase of property 23 years before being appointed Chairman of the Massachusetts Civil Service Commission, because this transaction involving a seller who was "a notorious figure in organized crime in Boston," as respondents claimed, "reflected poorly on his judgment and probity...."(App. 30-31). The district court continued:

> ...good judgment and integrity are certainly required of a chairman of the Commonwealth's Civil Service Commission, a quasijudicial entity. Furthermore, [respondents] legitimately could have feared that the *Boston Globe's* story about [petitioner's] transaction would reflect poorly on the Civil Service Commission and raise concerns among the public about the Commission's

> legitimacy, efficacy, and independence. *Whether a "for cause" dismissal would have ultimately been successful is irrelevant; there was enough information to have started such proceedings.*

(App. 31)(footnote omitted)(emphasis supplied).

This reasoning by the district court----affirmed by the court of appeals----so irretrievably dilutes the "purely coercive" analysis of the six other sister Circuits that it nullifies it entirely. The test is *not* whether proceedings to remove an employee can be *started*; the test is whether the reasons for the proposed termination can be *substantiated*, in this case whether there was "cause" within the meaning of Mass. G. L. c. 30, § 9, to discharge petitioner. To equate starting a removal proceeding with substantiating the reasons for removal, as both courts below did, robs the test of all force and permits respondents to put forth *any* reason at all for terminating petitioner without subjecting these reasons to the "for cause" standard of Mass. G. L. c. 30, § 9. That Romney could have *started* removal proceedings against petitioner based on an innocuous legal transaction 23 years earlier does not mean that he possibly could have *substantiated* cause for his removal and it is no reason in law to excuse respondents' purely coercive conduct in forcing petitioner to resign.

Contrary to the surmise of the district judge, there was no "cause" at all to remove petitioner from his position and respondents' threats to dismiss petitioner were thus "purely coercive." In *Levy v. Acting Governor*, 767 N.E.2d 66 (2002), the Supreme Judicial Court of Massachusetts recognized that what

constitutes sufficient "cause" within Mass. G. L. c. 30, § 9, to remove from office a member of a governmental agency is determined in the context of the authority of the particular agency to act as an independent body. *Id.* at 73-74. Thus where an agency is independent of the Governor, where the Governor has no supervisory, managerial or proprietary interest in the agency and where it is important to the public that it be "free from the changing winds of politics," the "cause" necessary to remove its chairman or member is malfeasance, misfeasance or wilful neglect of duty. *Id.* at 74-75;77. See *Flomenbaum v. Commonwealth*, 889 N.E.2d 423, 428(2008).

Here the Civil Service Commission is not under the Governor's supervision or control; it is primarily an administrative adjudicatory body. See Mass. G. L. c. 31, § 2. The petitioner is *not* a political appointee; he does *not* serve at the pleasure of the Governor; and the members of the Civil Service Commission----including petitioner—are *not* subject to executive supervision or control but rather perform quasi-judicial functions. Accordingly, under *Levy*, petitioner could only be removed for malfeasance, misfeasance or wilful neglect of duty. His entirely legal, arm's length purchase of property in Boston in 1980----23 years before his appointment----for its fair market price with a lawful rate of interest which was duly recorded in the registry of deeds and then fully paid off, could not possibly amount to malfeasance, misfeasance or wilful neglect of duty, justifying his termination.

Indeed, this long-vetted, legal, public transaction could not even constitute relevant proof that petitioner's competency to perform his job was in

question, or that there was an "honest dispute over policy," or that the public interest was somehow in jeopardy so that petitioner's removal was required. See *Flomenbaum*, 889 N.E. 2d at 428-429; *Levy*, 767 N.E. 2d at 77. See also *Murphy v. Casey*, 15 N.E. 2d 268,269(1938)(incompetency; lack of qualifications; neglect of duty as reasons for termination under § 9 with agencies under the Governor's direct control and supervision).

The entirely legal, public and fully vetted 1980 real estate transaction simply presents no "cause" for petitioner's termination within the meaning of Mass. G. L. c. 30, § 9. Instead of paying principled attention to these requirements of § 9, and knowing that "cause" for petitioner's removal could not possibly be substantiated in any "for cause" termination proceeding, respondents in order to mute the political embarrassment which the impending *Boston Globe* story would bring the next day, confected a fiction for themselves that this long-vetted legal transaction would somehow compromise the public's confidence in the Civil Service Commission, justifying petitioner's immediate resignation before the story was published so that his resignation would be included as part of the story.

To that end, since petitioner had already left his office at the end of his work day, they concocted a plan to demand petitioner's immediate resignation over the phone. Operating as a team, respondents first verified the facts in their first call to petitioner and then, twenty-five minutes later, demanded that he resign immediately, i.e., to "take one for the team," so that any negative political fallout would be deflected----and Romney would be saved the "political embarrassment"

of having to stand by his appointee who had done nothing wrong or illegal. In addition, by "creating" petitioner's resignation where there was none in the first place, respondents avoided giving petitioner his due process rights in the form of a "for cause" termination proceeding, the very kind of due process hearing which the affected employees received in *Levy*, *Flomenbaum* and *Murphy*.

Having no grounds to believe that the reasons for petitioner's proposed termination could be substantiated in any due process hearing(s), yet demanding his immediate resignation at all costs, respondents conduct was "purely coercive." *Schultz v. United States Navy*, *supra*. *Accord*, *Parker*, *supra*; *Stone*, *supra*; *Christie*, *supra*; *Cosby v. United States*, *supra*; *Autera v. United States*, *supra*; *Rich v. Mitchell*, *supra*. See *Paroczay v. Hodges*, 297 F.2d 439, 441 (D.C. Cir. 1961). The remaining factors identified in *Stone* point in the same direction: petitioner did not understand the nature of the "choice" given him by respondents in the 25 minutes he was allowed to consider it because he had done nothing wrong or illegal and no choice was even discussed—it was resign or nothing, there was no "Plan B"; he had just 25 minutes to consider his options, if any; he was clearly not permitted to select a time to resign—it had to be immediate in order for respondents to report it to the *Boston Globe*; and he had no opportunity to seek the advice of counsel. By the time Romney called petitioner at 8:15 P.M. on August 28, 2003, to accept his coercively forced resignation, petitioner's fate had already been sealed: unlike the affected employees in *Levy*, *Flomenbaum* and *Murphy*, he would receive no "for cause" hearing on his termination.

The Due Process Deprivation.

Even if the two phone calls between respondents and petitioner at 6:17 P.M. and 6:52 P.M. could constitute the constitutional minima of a pre-deprivation hearing for purposes of due process under *Laudermill*, there is no doubt on this record that petitioner was terminated some time during the second phone call. In its immediate wake, respondents called the *Boston Globe* to notify it of petitioner's resignation and Romney called petitioner at 8:15 P.M. for the purpose of expressing his appreciation to petitioner for "having resigned."(App. 23-24). He did not ask for petitioner's resignation during this phone call since he was told by his senior staff that petitioner had *already* agreed to resign. (App. 23). Thus petitioner's termination occurred some time during the second call with respondents on the evening of August 28, 2003, *not* on the following Tuesday, September 2, 2003, as the district judge found.

The Court's due process analysis in *Laudermill* rested on the employee's opportunity for a *full* post-termination hearing, i.e., Ohio law provided the petitioner there with a timely, full post-termination hearing where he could adduce and rebut evidence, engage in discovery, cross examine witnesses, etc., thus satisfying the Court's notion that due process requires a hearing "at a meaningful time and in a meaningful manner." *Id.* at 545-547. While a state procedure which does not provide the employee with this opportunity will be deemed constitutionally deficient, *id.* at 541, the Massachusetts "for cause" proceedings as exemplified in *Levy*, *Flomenbaum* and *Murphy* meet this constitutional minima.

However, Romney's brief and perfunctory telephone call to petitioner at 8:15 P.M. does not pass constitutional muster in this regard. Not only was petitioner denied any due process rights during this phone call in order to test the propriety of his discharge, he was denied an impartial decisionmaker: Romney regarded petitioner's resignation as an accomplished fact; he had avoided a "political embarrassment" by petitioner's forced resignation and he had no interest in revisiting the reasons for petitioner's discharge. Moreover, under Massachusetts law, *Romney and only Romney* could institute prompt "for cause" proceedings under Mass. G. L. c. 30, § 9, providing petitioner with post-termination due process, and he had no intention of doing so.

As *Laudermill* and its progeny holds, the post-termination hearing must be reasonably prompt and meaningful, especially when the right to the present entitlement of an office is at issue so that the remedy is available before the loss becomes complete and irrevocable. *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189;195-196 (2001). *Gilbert v. Homar*, 520 U.S. 924, 930;935 (1997). *Federal Deposit Ins. Corp. v. Mallen*, 485 U.S. 230, 243-246 (1988). See *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 436-437 (1982); *Barry v. Barchi*, 443 U.S. 55, 63-64 (1979). Yet Romney, by refusing to acknowledge that a "for cause" proceeding under Mass. G. L. c. 30, § 9, was necessary, and then by refusing to institute such a proceeding because it was not in his best political interests to do so, *provided no post-deprivation hearing at all to petitioner*. Faced with this lack of due process available to him in Massachusetts, petitioner eventually pursued his federal remedies under 42 U.S.C. § 1983. *Patsy v.*

Board of Regents of Florida, 457 U.S. 496, 500-501 (1982). *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

The district court's conclusion that post-termination remedies were available to petitioner in Massachusetts if he pursued civil actions for declaratory judgment, mandamus or certiorari not only misconceives who is responsible for providing petitioner with due process but also misreads Massachusetts law on these "remedies." In the first place, it was Romney's *exclusive* responsibility to provide petitioner with due process by conducting a "for cause" hearing under Mass. G. L. c. 30, § 9, and he had no intention of doing so. Second, as a matter of law, declaratory relief is *not* available against the Governor. *Town of Milton v. Commonwealth*, 623 N.E.2d 482, 485(1993) and cases cited. Nor is relief in the nature of mandamus available against the Governor. *Id.* citing *Rice v. The Governor*, 93 N.E. 821 (1911). Finally, certiorari lies only where there is a prior judicial or quasi judicial proceeding, a fundamental jurisdictional prerequisite which is absent here. *Town of Walpole v. Secretary Env. Aff.*, 537 N.E.2d 1244, 1247 (1989). *Cumberland Farms, Inc. v. Planning Bd.*, 779 N.E.2d 159,162 (Mass. App. 2002). See *Boston Edison Co. v. Board of Selectmen of Concord*, 242 N.E.2d 868, 872 (1968); *MacHenry v. Civil Service Com'n*, 666 N.E.2d 1029,1030-1031 (Mass. App. 1996).

Petitioner's Liberty Interest.

Petitioner's liberty interest is implicated when his good name, reputation, honor or integrity is at stake because of what the government is doing to him. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

Respondents' conduct in terminating petitioner for entering into an entirely legal real estate transaction 23 years earlier, the details of which had already been completely vetted, an termination which falsely implied that petitioner was somehow blameworthy, necessitated a name-clearing hearing so that petitioner could repair his reputation and reestablish his good name. Respondents' failure to provide him this opportunity not only denied petitioner due process but also deprived him of the liberty interest in his good name, reputation, honor and integrity.

Qualified Immunity.

The district judge's analysis of respondents' qualified immunity assumes as a fact that petitioner voluntarily resigned, that he waived his due process rights and that no reasonable official in the respondents' position, having understood petitioner to have effectively waived his rights to pursue any action by failing to take advantage of available statutory remedies, would expect that any further action was constitutionally required. (App. 39). For the reasons identified herein, respondents should be held to the knowledge of well established law as it existed in 2003 that their purely coercive conduct in forcing petitioner to resign in order to blunt the political embarrassment of an impending news article was insufficient reason to terminate petitioner without affording him his due process rights in the form of a "for cause" hearing under Mass. G. L. c. 30, § 9.

As the Court observed in *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978),

[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional.

Id. See *Garrity v. New Jersey*, 385 U.S. 493, 497-498 (1967).

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the First Circuit and, ultimately, to vacate and reverse this judgment against petitioner and remand the matter to the United States District Court for the District of Massachusetts with instructions that judgment enter in petitioner's favor on his claims against the respondents, or provide petitioner with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,
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No. 09-2458

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

WILLIAM P. MONAHAN, Plaintiff, Appellant,

v.

WILLARD MITT ROMNEY, ET AL., Defendants, Appellees.

November 3, 2010, Decided

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Nancy Gertner, U.S. District Judge.

Before Lynch, Chief Judge. Lipez, Circuit Judge, and Woodcock, * District Judge.

LYNCH, Chief Judge. In 2006, William P. Monahan filed suit against former Massachusetts Governor Willard Mitt Romney and several members of the Governor's senior staff: Eric Fehrnstrom, Nicholas Tzitzon, Shawn Feddeman, and Spencer Zwick. Monahan's complaint listed seven counts revolving around his central allegation that the defendants had unconstitutionally removed him from his office as Chairman of the Massachusetts Civil Service Commission in 2003, depriving him of protected property and liberty interests without due process of law.

After a four-day bench trial in April 2009, the district

court found that Monahan had voluntarily resigned and ruled against him on all counts. Monahan has appealed, arguing that the district court's findings of fact were wholly unsupported by the evidence and that the court therefore committed legal error in its conclusions of law. We hold that the district court's conclusions are well supported in the evidence and that it committed no error. We affirm entry of judgment for the defendants.

I.

In early 2003, William Monahan filled out an application for membership on the Massachusetts Civil Service Commission. The background information section on the application included the general question: "Is there any other information or potential conflicts that you feel should be known to us prior to the appointment?" Monahan answered "No."

Governor Romney appointed Monahan to be the Chairman of the Civil Service Commission. Monahan began work on August 1, 2003. He was to serve for approximately 4 years and 10 months--the time remaining in the term of the commissioner whom he was replacing. As a public officer, Monahan could only be removed for cause and his interest in continued employment was protected by the Due Process Clause of the Fourteenth Amendment. See Mass. Gen. Laws ch. 7, § 4I; Mass. Gen. Laws ch. 30, § 9; *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 576-78, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

On August 28, 2003, Frank Phillips, a noted investigative reporter from the Boston Globe, called Monahan to ask about his purchase in 1980 of a

property at 253 Tremont Street in Boston. Monahan and Dominic Paulo had purchased the property from Gennaro Angiulo, Donato Angiulo, Francesco Angiulo, Michele Angiulo, and Nicolo Angiulo, who were doing business as Huntington Realty. The Angiulo family was deeply connected to organized crime in Boston.[1] Monahan and Paulo had made a down payment of $80,000 on the building, and covered the balance of the purchase price by executing a promissory note for $180,000 secured by a mortgage with Huntington Realty.

After Phillips confirmed the facts of this transaction with Monahan, he contacted the Governor's Press Secretary, Shawn Feddeman, to inform her that he was working on a story about it. Feddeman conveyed this information to the Governor's Communications Director, Eric Fehrnstrom, and they decided to ask Monahan whether the story was true. The dispute in this case revolves around the content of three ensuing phone calls with Monahan.

At approximately 6:15 p.m., Fehrnstrom and Feddeman--along with Nicholas Tzitzon, the Governor's Director of Appointments--made the first call to Monahan. While it is uncontested that in this call Monahan confirmed that the story was true, there is conflicting testimony about what else was said. Monahan testified that the Governor's staff told him in "very swell and pitched voices" that he needed to resign, to which he responded that the story had been well vetted a dozen years ago, that he had done nothing wrong, and that he thought that the Governor had been aware of the transaction.[2] Fehrnstrom and Feddeman testified that they did not mention resignation during

that call, but merely asked Monahan about the transaction and why he had not disclosed it in his job application.

After this call, Fehrnstrom and Spencer Zwick, Romney's Deputy Chief of Staff, contacted Governor Romney. They discussed the nature of the real estate transaction, the prior media attention that it had received, and the pending story to be published in the Boston Globe. Romney told them that he was concerned that Monahan was leading a Commission that acted in a quasi-judicial role, and that Monahan's involvement would severely impact the reputation of the Commission and the reputation of the Commonwealth. Romney decided that Monahan could not be allowed to retain his position, and that he would offer Monahan a chance to resign, and in the alternative, go through the steps to remove him. Romney instructed Zwick to request Monahan's resignation and authorized Zwick to accept a resignation on his behalf.

At 6:52 p.m., Zwick made the second call to Monahan--with Fehrnstrom and Tzitzon also on the line--to request Monahan's resignation. Monahan testified that during this call, Zwick told him that he needed to "take one for the team" and resign, to which he replied that he was a team player and would resign if he thought that it was either in the Governor's or his own best interests, but that it was not in either of their interests. Monahan testified that Zwick provided him with a number for faxing his letter of resignation, that he wrote down the number, but that he did not commit to resigning.

Monahan's account of this call was contradicted by the

testimony of Governor Romney's staff. According to Tzitzon's testimony about the call, Monahan stated that he would in fact resign, Zwick replied that he needed to confirm that Monahan was offering his resignation, and Monahan responded that he was. This account of the call accords with Zwick's testimony that his understanding from the call was that Monahan had offered to resign, and that he had accepted the resignation on Romney's behalf. Fehrnstrom's testimony was also in agreement on this point. Although Fehrnstrom could not "remember the precise words that were used" by Monahan, it was "clear" to him that Monahan had "agreed to voluntarily step down." This was clear because when Fehrnstrom informed Monahan that he was going to notify Phillips at the Boston Globe of the resignation, Monahan "did not object at all" as he "understood that this was the course of action that he had decided upon."

After this call, Zwick informed Governor Romney of Monahan's resignation, and Fehrnstrom informed Feddeman. Feddeman then contacted Phillips at the Boston Globe, explaining that Monahan had resigned and that Romney had accepted his resignation.

At 8:15 p.m., Governor Romney made the third call to Monahan. Romney testified that he began this conversation by thanking Monahan for tendering his resignation, to which Monahan did not say or indicate in any way that he had not in fact resigned. Romney testified that they talked about the fact that Romney had not been aware of the real estate transaction, that it should have been indicated on Monahan's job application, and that Romney would not have appointed Monahan if he had known about it. Romney testified

that he offered to help Monahan find alternative employment, and that when he made this offer, Monahan did not respond by saying that he did not require any help because he had not resigned. Monahan contested this account. Monahan's version was that he told Romney that he did not think that it was in either of their best interests for him to resign, and that therefore he "wasn't going to resign." Monahan testified that Romney merely told him that he should "think it over" and that Romney would help Monahan get a job in the private sector if Monahan resigned.

The next day, August 29, 2003, the Boston Globe published a story on the 1980 transaction and on Monahan's resignation as Chairman of the Massachusetts Civil Service Commission. The parties agree that Monahan went to work that day and found that his garage parking pass no longer worked, and that he worked for part of the day and then went home. At home, he received a phone call from Tzitzon asking why he had not yet faxed his letter of resignation. Monahan testified that he replied that he "wasn't planning to fax any resignation," whereas Tzitzon testified that Monahan said that he would be happy to send a letter but that he might be delayed because of problems with his printer.

The following day--Saturday, August 30--Joseph Brodigan, a friend of Monahan's and an attorney, informed Zwick that Monahan would not be resigning. When business resumed on the Tuesday after Labor Day, Romney's legal counsel faxed Brodigan a letter stating that it was the administration's position that Monahan had submitted an oral resignation on Thursday, August 28, and that Governor Romney had

accepted that resignation. Approximately a week later, Monahan's counsel responded with a position statement stating that Monahan had spent the day after his conversation with Romne thinking about the suggestion that he should resign, that he had decided he must not resign in those circumstances, and that his representative had communicated this decision.

The district court, confronted with conflicting testimony, found "the defendants' version of the facts to be more credible." The court concluded that Monahan voluntarily relinquished his position, that he was not coerced to do so, and that therefore, "the Due Process Clause [was] not implicated since no 'deprivation' of a constitutionally protected interest occurred."[3] The court entered judgment for the defendants on all counts. Monahan filed a timely appeal.

II.

A district court's findings of fact after trial "must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52(a)(6); *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985). "A party who challenges a district court's findings of fact, arrived at after a bench trial, faces a steep uphill climb. When a district court finds the facts without the intervention of a jury, the court of appeals is not at liberty to start afresh." *Fed. Refinance Co. v. Klock*, 352 F.3d 16, 26-27 (1st Cir. 2003). Where there are "two permissible views of the evidence," the "factfinder's choice between those competing views cannot be clearly erroneous." *Id.* at 29. The district court's legal

determinations are reviewed de novo. *Am. Nat'l Fire Ins. Co. v. York County*, 575 F.3d 112, 118 (1st Cir. 2009). But this case involves, in the end, no issues of law.

In explaining its finding that Monahan had voluntarily resigned, the district court provided a detailed account of the witness testimony and other evidence presented at trial, and it weighed the evidence in accordance with its responsibility as the trier of fact. The court made express credibility determinations, finding reason to reject Monahan's testimony about aspects of all three phone calls, and gave well reasoned explanations.

As to the first phone call, the court found a tension between Monahan's testimony and the testimony of the defendants. Monahan testified that Romney's staff had pressured him to resign in this first call. However, the court found that at the time of this call, Fehrnstrom and Feddeman had not yet spoken with Governor Romney, and that their focus was on obtaining information, not resignation. The court credited the testimony of Fehrnstrom, and rejected that of Monahan.

As to the second call, the court again rejected key aspects of Monahan's testimony. The court found it "inconceivable that Feddeman would have made [the call to the Globe] had she not been convinced that Monahan had resigned. A dispute about resignation would have turned a 'one day' story into a multiple day story, precisely what the Governor's staff wanted to avoid." There was too great a risk "that Monahan would contest a concocted story of resignation, giving rise to even more unwanted negative publicity." The court also noted that although Fehrnstrom told Monahan that he

was going to report Monahan's resignation to the Globe, Monahan did not state that he needed more time to decide, as one would expect if he had not in fact resigned.

As to the third phone call, which was between Monahan and Governor Romney, the district court credited Romney's testimony, and rejected Monahan's claim that he told Romney in this call that he would not resign. The court's decision was in part based on the fact that Monahan's testimony about the call differed in an important respect from the position statement that he had written shortly after the call. At trial, Monahan testified that he had told Romney on the phone: "[I]f I thought it was in his best interests or mine, I would resign, but I didn't think that it was, and I wasn't going to resign." The position statement stated: "I informed the Governor that if I determined that it was in his best interest and in my best interest, that I would resign. At that point he gave me a private number in order to get in further contact with him." The court found that the absence of the line "I wasn't going to resign" in the position statement was telling, and credited Romney's testimony against that of Monahan.

The district court found that Monahan's resignation was not involuntary. In making this finding, the court cited the fact that Monahan had a choice between resignation and termination; that Monahan had a law degree and understood that he was under no obligation to resign and possessed the power to reject the defendants' request; that to the extent any coercion was inherent in the request, it was reduced by the fact that the request was made by phone; and that although Monahan likely felt pressure to make a quick decision, he could have requested more time or demanded to

speak to the Governor to argue against resignation. Under these circumstances, the court found, Monahan's resignation was not involuntary. The district court's reasons were well supported and well explained. On appeal, no question of law is raised.[4]

Because Monahan voluntarily resigned, his claim that the defendants deprived him of a property interest within the meaning of the Due Process Clause necessarily fails. See *Stonev. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 167, 173 (4th Cir. 1988) ("If he resigned of his own free will even though prompted to do so by events set in motion by his employer, he relinquished his property interest voluntarily and thus cannot establish that the state 'deprived' him of it within the meaning of the due process clause."). For the same reason, Monahan's claim that the defendants deprived him of a constitutionally protected liberty interest also fails. See *Lyons v. Sullivan*, 602 F.2d 7, 11 (1st Cir. 1979) ("While defamation in the course of termination of governmental employment does entitle an employee to procedural due process protection, . . . the facts alleged do not bring plaintiff within this rule since plaintiff's employment was not terminated; plaintiff resigned.") (citation omitted).

The district court's judgment is affirmed.

Footnotes

*Of the District of Maine, sitting by designation

1See, e.g., *United States v. Barone*, 114 F.3d 1284, 1289 (1st Cir. 1997) ("In the early 1980s, the Patriarca Family was run by boss Raymond Patriarca, Sr.,

underboss Gennaro 'Gerry' Angiulo, consigliere Vittore Nicolo Angiulo, and capo regimes including Donato F. 'Danny' Angiulo . . . ."); *United States v. Angiulo*, 897 F.2d 1169, 1175-76 (1st Cir. 1990) (stating that "Gennaro Angiulo, Donato Angiulo, . . . Francesco Angiulo, and Michele Angiulo, are all members or associates of the Patriarca Family of La Cosa Nostra" and that "Gennaro Angiulo was the underboss of this organization, in charge of its day-to-day operations").

2The purchase of the property had been reported in the media in the early 1990s, when Monahan was serving as town selectman in Belmont and running for state representative. Monahan had appeared on a local cable television channel for an hour to discuss the transaction and answer phone calls about it. He testified that he assumed that Romney, who lived in Belmont, knew about the purchase and the media attention that it had received.

3The court held, in the alternative, that even assuming Monahan had not voluntarily resigned, "he was afforded all of the process he was constitutionally due. Monahan's pre-deprivation process--which included an extended conversation with the chief executive officer himself, Governor Romney--and the post-deprivation remedies available to him under Massachusetts law were more than adequate to meet the requirements of the Due Process Clause." The district court further determined that, even if Monahan was not afforded adequate post-deprivation process, defendants would be entitled to qualified immunity because the claimed "unavailability" or inadequacy of the post-deprivation remedies was not clearly established at the time of the challenged conduct.

4This appeal does not raise the issue of what legal standard should be employed to determine voluntariness. The parties do not contest the district court's application of the standard set out in *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 167 (4th Cir. 1988), which was cited by this court in *Walker v. Waltham Housing Authority*, 44 F.3d 1042, 1047 (1st Cir. 1995). Monahan's argument that the court erred in finding that he voluntarily resigned is based on his claims that the court's underlying factual findings are unsupported. He argues, for example, that "the trial court's confusion as to factual findings, for which the Court has wide latitude, leads the Court to an erroneous legal finding."

9/3/09

06-10921

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

WILLIAM P. MONAHAN, Plaintiff,

v.

WILLARD MITT ROMNEY, ET AL., Defendants,

Hon. Nancy Gertner, U.S. District Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. INTRODUCTION

William Monahan ("Monahan") alleges that he was deprived of a vested property interest -- namely, his position as Chairman of the Massachusetts Civil Service Commission – without due process of law. Monahan has sued former Governor Willard Mitt Romney ("Romney") and several of Romney's staff over the termination of his employment in August 2003, after the defendants[1] asked for his resignation, concluding that Monahan's continuing service would be a political liability to the Governor. Monahan contends that he never actually resigned, and therefore was due a hearing to establish whether the Governor had "cause" for his removal under state law. Governor Romney and his aides insist that Monahan orally tendered his resignation, that they accepted it and that, as such, Monahan was owed no additional process.

It is important to put this case in context from the outset. First, the facts are unusual, centering on a series of phone calls occurring over one evening, including a conversation between Monahan and the Governor himself. Second, Monahan's challenge is not about whether it was right or wrong to ask for his resignation; this is not a claim about the merits of the defendants' decisions. Rather, it is a federal due process challenge, concerned only about the procedures that were followed. If I find that Monahan voluntarily relinquished his position, the Due Process Clause is not implicated since no "deprivation" of a constitutionally protected interest occurred. See Walker v. Waltham Hous. Auth., 44 F.3d 1042, 1047 (1st Cir. 1995); Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 167, 173 (4th Cir. 1988). If I find that Monahan did not resign, then he was effectively discharged, and I must consider whether he was entitled to any more process.

After a four-day bench trial, at which all of the parties to this action testified, I find that Monahan voluntarily resigned. The gist of the conversations between the parties, defendants' statements to him, and his responses, support defendants' position. This is particularly the case given inconsistencies in plaintiff's statements, notably about whether he ever actually said he would resign, and when he changed his mind.

In the alternative, I find that even if Monahan did not voluntarily resign, he was afforded all of the process he was constitutionally due. Monahan's pre-deprivation process – which included an extended conversation with the chief executive officer himself, Governor Romney -- and the post-deprivation remedies available to him under Massachusetts law were more than adequate to

meet the requirements of the Due Process Clause. Accordingly, I conclude that judgment should enter for the defendants on all claims.

II. BACKGROUND AND FINDINGS OF FACT

A. Monahan's Application and Appointment

On July 18, 2003, Monahan was appointed Chairman of the Massachusetts Civil Service Commission by Governor Romney. He was to have retained his office for a fixed five-year term that terminated in March 2008.[2] His appointment was made pursuant to Mass. Gen. Laws ch. 7, § 4I. As a public officer, he was guaranteed his position unless he was removed for cause. Mass. Gen. Laws ch. 30, § 9.

I recognize that this post was extremely important to Monahan, perhaps more important than it would be for another man. Monahan was 69 years old. A lawyer previously, he had been urged to give up his practice because of a heart condition. He believed that he was qualified for the civil service position because of his considerable experience in local politics and community relations -- specifically, on the Belmont Board of Selectman from 1978 through 2002, and as its chair for a part of that period.[3] As a civil service commissioner, he was to be paid $82,000 per year.

Monahan had come to know Romney in part as Belmont neighbors and in part because of his official responsibilities. They had worked together in connection with the building of the Mormon church in Belmont. Furthermore, Monahan was a supporter of Romney during his run for the United States Senate.

In 2003, Monahan applied to be a member of the Civil Service Commission. The application called for background information concerning Monahan's employment and work history. The application was clearly intended to identify any potential problems with the nominee -- misconduct accusations, whether he had paid his income taxes, whether there had been any proceedings instituted against him by the Massachusetts Ethics Commission or a similar body in another state, pending litigation, business delinquencies, etc. In particular, it included a catch-all question, "Is there any other information or potential conflicts that you feel should be known to us prior to the appointment?" Significantly, Monahan answered, "No." *See* Trial Exh. 7. He did not think that there was anything in his life that would qualify as "illegal matters" or "things that might be embarrassing for [him] or for the Governor." Trial Tr. 76, Apr. 21, 2009.

B. The Tremont Street Purchase

Monahan's application to the Civil Service Commission was successful. His first day of work was August 1, 2003. Approximately four weeks later -- shortly after 5:00 p.m. on Thursday, August 28, 2003 -- Monahan received a call at his office from Frank Phillips, a reporter for the *Boston Globe*. Phillips asked Monahan about a 1980 real estate purchase involving property at 253 Tremont Street, Boston, Massachusetts -- a transaction Monahan had not disclosed in his application.

In 1980, Monahan and another man, Dominic Paulo, purchased a building on Tremont Street from the Angiulo family, d/b/a Huntington Realty Co. Gennaro

Angiulo was reportedly a leader of organized crime in the city of Boston. Monahan and Paulo put a down-payment of $80,000 on the building, and covered the balance of the purchase price by executing a promissory note for $180,000 with Angiulo that was secured by a mortgage on the building. The note was fully paid in 1989, and Monahan sold his interest in the property shortly thereafter.

The 1980 transaction had proved to be very controversial and embarrassing earlier in Monahan's career. In December 1992, when Monahan was a town selectman, there were"vicious accusations and vile talk about [his] being a member [of the mafia or being] paid by the mafia." Trial Tr. 89, Apr. 21, 2009. The matter was widely reported in the local press at the time. Monahan even went on a local cable news program to answer questions about it. Press reports were again circulated during Monahan's campaign for state representative, in which he was ultimately unsuccessful. Notwithstanding the controversy, Monahan was elected as town selectman a number of times after the incident. According to Monahan, because he assumed that Governor Romney had previously heard about the 1980 transaction nearly a decade earlier – and because it was so far in the past – he did not believe he needed to include it on his civil service application.

After Monahan spoke with Frank Phillips, a series of phone calls with the various members of the Governor's staff followed, and by late Thursday evening, Monahan had spoken with the Governor himself.[4] The parties differ as to the content of these conversations, not the fact of them. Most of the dispute concerns whether or

not Monahan agreed to resign. Monahan insists that he explicitly communicated that he would not resign, a position I do not find credible. The Governor's senior staff and the Governor himself testified, however, that Monahan eventually agreed to relinquish his post and that the Governor, through his delegate Spencer Zwick, formally accepted his resignation that evening, even though only Tzitzon recalls an explicit, "I will resign" statement.

C. Call #1: Fehrnstrom, Feddeman, Tzitzon, and Monahan

1. Monahan's Description of Call #1

At approximately 6:15 p.m. on August 28, 2003, Monahan received a phone call from Fehrnstrom, Feddeman, and Tzitzon, senior staff for Governor Romney.[5] According to Monahan, Feddeman and Fehrnstrom spoke in "a very, very pitched manner" and with a "hostile" tone, discomfiting him. Trial Tr. 88, Apr. 21, 2009. They informed Monahan that Frank Phillips from the *Boston Globe* had called them, reporting that Monahan had purchased a piece of property from Gennaro Angiulo. They asked Monahan whether the facts reported by Phillips were true. They also told him that the purchase -- even if it was at arm's length, as Monahan claimed – was embarrassing to the Governor and that he had to resign. Monahan claims that Fehrnstrom, in particular, "kept raising his voice higher and higher." Trial Tr. 5, Apr. 22, 2009.

Monahan testified that he told the callers that the story regarding the real-estate transaction had been "well vetted a dozen years ago," that he had done nothing

wrong, and that he "thought that the Governor would be aware of it." Id. at 6. But Fehrnstrom insisted that it would be "the Bulger story all over again."[6] If Monahan resigned, Fehrnstrom claimed, the *Boston Globe*'s report would be a "one-day story, but if [Monahan] didn't resign . . . it [would be] a ten-day story." Id. at 7. Monahan then asked to speak to the Governor, saying that "it could be all explained and there wasn't any reason for them to be so upset." Id. According to Monahan, the Governor's staff members explicitly asked him to resign, and he explicitly refused. I reject that testimony.

2. Defendants' Description of Call #1

According to Fehrnstrom and Feddeman, however, this was a professional conversation in which they allowed Monahan to give his version of events and inquired about why Monahan had not disclosed the information in his background questionnaire. Monahan responded that he had not done so because the story had been amply covered some years before. Fehrnstrom reported that he did not raise his voice and there was no mention of the "Bulger" story. Resignation, they maintained, was not even discussed.

The Court credits Fehrnstrom's testimony on the latter point; at the time that Fehrnstrom and Feddeman called Monahan, they had not yet reached the Governor. Feddeman and Tzitzon agree that the conversation was mainly about getting information; resignation was not the focus.

Zwick and Fehrnstrom called Governor Romney to inform him that "there was a matter in Monahan's

background that [they] had not been aware of and that was troubling to them." Trial Tr. 7, Apr. 23, 2009. Romney reported that his staff "described in some detail the nature of the financial relationship and the attention that this had received in prior media reports."[7] Id. at 8. His staff stated that the *Boston Globe* was inquiring about the transaction. Romney indicated that he was concerned that Monahan was set to lead the Civil Service Commission, a position that would require him to act in a "quasi judicial role," and "that having an individual [on the commission] that had a financial relationship in the past with an organized crime figure would severely impact the reputation of this commission and the reputation of the Commonwealth." Id. at 8-9. In particular, the civil service post required Monahan to exercise judgment -- judgment which some of the staff believed was compromised because he had agreed to participate in a business transaction with Gennaro Angiulo. Romney also asked whether Monahan had disclosed the 1980 transaction in his application and was told that he had not. Romney decided that Monahan should be given an opportunity to resign and, if he did not, Romney would remove him. Zwick was delegated the responsibility to call Monahan and if Monahan agreed, to accept his resignation on the Governor's behalf.[8]

D. Call #2: Zwick, Fehrnstrom, Tzitzon, and Monahan

1. Monahan's Description of Call #2

At 6:52 p.m., with Fehrnstrom and Tzitzon also on the line, Zwick called Monahan again, telling him that he needed to "take one for the team." Trial Tr. 15, Apr. 22,

2009. Monahan understood this to mean that he should resign. Monahan replied that if he thought it was in the Governor's best interest or in his own best interest, he would resign; however, he stated that although he was a "team player," his resignation would not be in the Governor's interest or in his interest.

Monahan then testified that Zwick reiterated that Monahan should resign, and provided him with the number through which he could fax the resignation. He also asked to speak with the Governor. Monahan testified that Zwick's tone was more calm than Fehrnstrom's had been in the 6:17 p.m. call, but insisted that at no time in this conversation or earlier did he agree to resign. However, Monahan agreed that he had recorded the number of the fax.

2. Defendants' Description of Call #2

Fehrnstrom and Zwick take a different view of the 6:52 p.m. call. Fehrnstrom conceded that Monahan was reluctant to resign, at first, and argued that the facts did not merit his resignation. However, while he does not remember Monahan's exact words, Fehrnstrom testified that by the end of the call Monahan had agreed to resign and that Zwick communicated the Governor's acceptance of the resignation. Tzitzon was even more explicit in his testimony. Listening in on the line, he claimed that Monahan said he would in fact resign. Zwick agreed with Fehrnstrom and Tzitzon that Monahan had resigned although he did not recall the exact words. Fehrnstrom went so far as to tell Monahan that the administration would report his resignation -- and Romney's acceptance -- to the *Boston Globe*.

Significantly, both sides describe this as a conversation among peers, even political allies. It was not really about whether Monahan did or did not do the right thing decades before, but rather what was in the Governor's interest, what "the team" required in the light of the publicity. And during that conversation Monahan either explicitly agreed to resign, as Tzitzon described, or strongly implied as much.

Shortly thereafter, Feddeman called Phillips to let him know that Monahan had resigned and that Romney had accepted his resignation. This call to the *Globe* was a critical one. It is inconceivable that Feddeman would have made this call had she not been convinced that Monahan had resigned. A dispute about resignation would have turned a "one day" story into a multiple day tory, precisely what the Governor's staff wanted to avoid. Meanwhile, Zwick called Romney to let him know of Monahan's resignation.

E. Call #3: Romney and Monahan

1. Monahan's Description of Call #3

At 8:15 p.m., Romney himself called Monahan. Romney reported to Monahan that his entire senior staff had advised him to ask for Monahan's resignation. According to Monahan, he told Romney that he would not resign. (Romney, as described below, testified wholly opposite.) Monahan testified that he "pleaded" with the Governor to try to recall that the story had come out before, and the Governor indicated that he had no memory of it. He told the Governor that the issue was not "about a job" but rather his "reputation" and his good name. Trial Tr. 24, Apr. 22, 2009.

According to Monahan, he told the Governor, "[I]f I thought it was in his best interests or mine, I would resign, but I didn't think it was, and I wasn't going to resign." Id. at 23. Romney then told him to "think it over" and reported that he would help him get a job in the private sector. Id. Monahan claims that the call ended with Romney giving him a number to call Zwick, at anytime, and assuring him that Zwick would find Romney so he and Monahan could talk further.

2. Romney's Description of Call #3

According to Romney, Monahan never said that he would not resign, and I credit that statement. Indeed, in Monahan's position statement submitted on September 9, 2003, he recounts his conversation with Romney but does not report the line that he insisted on during his testimony, "I wasn't going to resign." Trial Exh. 4, ¶¶ 18-19. The statement is a critical one; its omission peaks volumes.9 According to Romney, he expressed his appreciation to Monahan for "having resigned" and offered to help Monahan find another position in the private sector. (Monahan agrees that there were discussions about what he would do next, after he left his government position.)

Romney testified that he did not ask for Monahan's resignation during the phone call because he had been told by his senior staff that Monahan had already agreed to resign. According to Romney, he merely called Monahan to thank him for previously tendering his resignation. Romney characterized the call as one involving a "full discussion of the circumstances that had been brought to [his] attention," in which Monahan had the opportunity to discuss his real-estate

transaction with Angiulo and his resignation "in some depth." Trial Tr. 41, Apr. 23, 2009.

F. Subsequent Events

The next day, Friday, August 29, 2003, the *Boston Globe* published a story describing Monahan's resignation, as well as the 1980 transaction. Monahan went to work that day, although his parking pass was no longer valid. On the same day, Tzitzon called Monahan, "wondering why [Monahan] hadn't faxed [his] resignation." Trial Tr. 31, Apr. 22, 2009. According to Monahan, he replied that he was not planning to do so. Tzitzon remembers no such comment. He testified that Monahan reported he had not faxed his resignation because he was having problems with his printer.

On Saturday, August 30, 2003, a friend of Monahan's and an attorney, Joseph Brodigan, called Zwick to tell him that Monahan would *not* be resigning.

That Tuesday, September 2 (Monday was Labor Day), Monahan again went to work. Monahan left, however, under an agreement between his counsel and the Governor that his leaving would not be interpreted as a resignation. He never returned to the Civil Service Commission. Daniel Winslow, the Governor's legal counsel, then sent a letter to Monahan's counsel confirming the Romney administration's position that Romney had accepted an oral resignation submitted by Monahan on August 28. Trial Exh. 11.

A week later, Monahan, via his counsel, submitted a position statement to Winslow, which is significant in two respects. First, as described above, the position

statement does not mention that Monahan ever insisted to Romney that he would not resign, a comment central to his trial testimony. Second, the statement asserts that Monahan came to the conclusion that he should not resign on *Friday, August 29, 2003*, the day after his resignation was accepted, whereas in his testimony before the Court on April 22, 2009, he claimed he told Romney he would not resign on *Thursday, August 28, 2003*. Trial Exh. 4, ¶ 21.

Since the date that Monahan left the Civil Service Commission, he has not looked for a job, although he continued to hold a position on the Board of Directors of Leader Bank, a position which pre-dated his appointment.[10]

On this record, the Court has no doubt that Monahan was either silent in the face of the exhortations of the Governor's senior staff on August 28 that he resign, a silence which communicated he was prepared to go along with them, or he explicitly yielded to their requests. I do not find his testimony that he steadfastly refused to resign to be credible. He did not ask for more time to think about resignation, when he knew that defendants were going to report his resignation to the *Boston Globe* momentarily. And in that regard, I have no doubt that senior staff would not have done what they did -- communicating Monahan's resignation to the *Boston Globe*, and thereby exposing themselves to greater controversy with an on-again, off-again resignation --unless Monahan had agreed to their plans. The risk that Monahan would contest a concocted story of resignation, giving rise to even more unwanted negative publicity, was simply too great. I find that while Monahan indicated that he would resign on the phone that evening, he thought the better of it by the

next morning when he decided to go into work -- but then it was too late. The resignation had been accepted.

Since the defendants reasonably believed Monahan had voluntarily resigned, he was not offered a post-termination hearing with Governor Romney. There was, as Fehrnstrom testified, no "plan B" if Monahan had not agreed to resign. Trial Tr. 53, Apr. 23, 2009. However, Romney later appointed John Guerin to Monahan's position on the Commission; Guerin was to begin serving in January 2004. Before Guerin took office, Monahan filed suit in Middlesex County Superior Court to enjoin Guerin from occupying Monahan's position.[11] After the superior court denied Monahan's motion for a preliminary injunction on the grounds that he had failed to demonstrate a likelihood of success on the merits, Monahan v. Guerin, MICV 2004-0195-B(Mass. Super. Ct. Jan. 27, 2004), Monahan did not prosecute his state-court action, and it was ultimately dismissed.

III. PROCEDURAL HISTORY

The complaint alleges seven distinct causes of action: (1) defendants deprived Monahan of property without due process of law; (2) defendants deprived Monahan of liberty without due process of law; (3) defendants coerced Monahan into resigning and thus deprived him of property without due process of law; (4) defendants were deliberately indifferent to Monahan's right not to be deprived of property without due process of law; (5) defendants were deliberately indifferent to Monahan's right not to be deprived of liberty without due process of law; (6) defendants conspired to obtain Monahan's resignation by coercion; and (7) Monahan's resignation

should be rescinded because it was obtained by undue influence. The Court denied defendants' motion to dismiss on September 25, 2007. A four-day bench trial was held before this Court in April 2009.

IV. CONCLUSIONS OF LAW

A. Since Monahan Voluntarily Resigned, He Was Not Deprived of a Constitutionally Protected Property Interest Without Due Process of Law.

Although Monahan's complaint raises seven separate claims, they all revolve around his central allegation that defendants deprived him of constitutionally protected liberty and property interests without due process of law. See U.S. Const. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."); 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .").

There is no question that Monahan had a constitutionally protected property interest in his position as chairman since he could only be removed from office during his five-year term "for cause." Mass. Gen. Laws ch. 7, § 41; Mass. Gen. Laws ch. 30, § 9; see also Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532, 538-41 (1985). Nevertheless, when a government

official voluntarily relinquishes his post, no "deprivation" of a property interest occurs; the Due Process Clause simply is not implicated. Walker v. Waltham Hous. Auth., 44 F.3d 1042, 1047 (1st Cir. 1995); Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 167, 173 (4th Cir. 1988); Dodd v. Sheppard, 436 F. Supp. 2d 326, 337 (D.R.I. 2006); Patterson v. Tortolano, 359 F. Supp. 2d 13, 17 (D. Mass. 2005).

Naturally, the parties take diametrically opposed positions on whether Monahan resigned from his post. Monahan claims that he never agreed to do so. Defendants claim that Monahan orally submitted his resignation to Spencer Zwick during a phone conversation around 6:52 p.m. on August 28, 2003, and Zwick accepted the resignation on Governor Romney's behalf.[12] As stated above, the Court finds the defendants' version of the facts to be more credible.[13]

Absent a contrary statutory provision (and none applies here), oral resignations in Massachusetts are effective upon acceptance and cannot subsequently be withdrawn. Campbell v. City of Boston, 151 N.E.2d 68, 70 (Mass. 1958) ("It is not necessary that the resignation be in writing. Once accepted, the severance from office is complete." (citation omitted)); Warner v. Selectmen of Amherst, 95 N.E.2d 180, 183 (Mass. 1950) ("Official robes cannot be put off and assumed at the pleasure of individuals or officers. Public interest requires that all possible certainty exist in the election of officers and the beginning and expiration of their terms, by law or resignation, and forbids that either should be left to the discretion or vacillation of the person holding the office or the officer or body having the appointing power." (quoting State ex rel.

Bergshicher v. Grace, 82 S.W. 485, 487 (Tenn. 1904))); Johnson v. Griswold, 58 N.E. 157, 157 (Mass. 1900). Thus, in its decision denying Monahan's motion for a preliminary injunction, the Massachusetts superior court stated, "There is no requirement that a resignation or the acceptance of a resignation be in writing in order to be effective. Once a resignation is accepted, severance from office is complete." Monahan v. Guerin, MICV 2004-0195-B, at 2 (Mass. Super. Ct. Jan. 27, 2004).

To be sure, Monahan could attempt to save his case by arguing that even if he resigned, his resignation was not voluntary. If a government employee's resignation is "so involuntary that it amount[s] to a constructive discharge, it must be considered a deprivation by state action triggering the protections of the due process clause." Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 167, 173 (4th Cir. 1988); see also Walker v. Waltham Hous. Auth., 44 F.3d 1042, 1047 (1st Cir. 1995) (citing *Stone* with approval).[14] As the Fourth Circuit has stated, "[a] public employer obviously cannot avoid its constitutional obligation to provide due process by the simple expedient of forcing involuntary 'resignations.'" Stone, 855 F.2d at 173. Monahan bears the burden of proving that his purported resignation was involuntary. Hargray v. City of Hallandale, 57 F.3d 1560, 1568 (11th Cir. 1995).

The touchstone of the inquiry is "whether the employee was denied the opportunity to make a free choice." Stone, 855 F.2d at 174. Generally, a resignation may be involuntary in one of two circumstances: (1) "where obtained by the employer's misrepresentations or deception"; and (2) "where forced by the employer's

duress or coercion." Id. Since Monahan does not claim that defendants obtained his resignation by misrepresentation or deception, only the "duress/coercion" theory is potentially applicable to this case. Courts have generally considered a non-exclusive list of five factors in determining whether a government employee's resignation was the product of duress or coercion: "(1) whether the employee was given some alternative to resignation; (2) whether the employee understood the nature of the choice he was given; (3) whether the employee was given a reasonable time in which to choose; (4) whether the employee was permitted to select the effective date of the resignation; and (5) whether the employee had the advice of counsel." Hargray, 57 F.3d at 1568.

While some of these factors arguably militate in Monahan's favor, others do not. Monahan was given an alternative to resignation -- removal for cause under Mass. Gen. Laws ch. 30, § 9. Admittedly, this alternative was not very attractive, but "[a] choice between resignation or termination does not establish that the resignation was involuntary, unless the employer lacked good cause to believe that there were grounds for termination." Parker v. Bd. of Regents of Tulsa Jr. Coll., 981 F.2d 1159, 1162 (10th Cir. 1992). There was an arguable basis for concluding that the Governor could remove Monahan from office under Mass. Gen. Laws ch. 30, § 9. Monahan failed to disclose in his civil service application his real estate transaction with Gennaro Angiulo, a notorious figure in organized crime in Boston, and the extraordinary public scrutiny the transaction had previously garnered. Defendants claim that the Angiulo transaction, and Monahan's failure to reveal it, reflected poorly on his judgment and

probity, and good judgment and integrity are certainly required of a chairman of the Commonwealth's Civil Service Commission, a quasijudicial entity. Furthermore, defendants legitimately could have feared that the *Boston Globe*'s story about Monahan's transaction would reflect poorly on the Civil Service Commission and raise concerns among the public about the Commission's legitimacy, efficacy, and independence.[15]

Whether a "for cause" dismissal would have ultimately succeeded is irrelevant; there was enough information to have started such proceedings.

There also is no reason to doubt that Monahan "understood the nature of the choice he was given." Hargray, 57 F.3d at 1568. Monahan was not an unsophisticated new hire who could not be expected to be familiar with the procedural protections afforded government officials threatened with termination. Cf. Stone, 855 F.2d at 177 ("Stone was not a naive intern in his first clinical assignment; he was a sophisticated and well-educated hospital administrator with over thirty years experience as a member of the medical staffs of some of the finest hospitals in the country."). Monahan graduated with a J.D. from the Suffolk University Law School in 1971 and as a member of the Massachusetts bar until approximately nine years ago. Trial Tr. 60-61, April 21, 2009. Indeed, the tenor of the conversations with the Governor's senior staff and the Governor himself suggests that these were conversations among peers, in which Monahan agreed that he was part of the "team" and that he would resign if it was in the Governor's political interest for him to do so. He plainly understood that he was under no obligation to resign

and had the power to reject the defendants' request that he do so. Trial Tr. 16, Apr. 22, 2009 ("I told Mr. Zwick that if I thought it was in the Governor's best interests or in my own best interests that I would resign, that I do consider myself to be a team player but it wasn't in the Governor's interest or my interest."). I find that Monahan understood his options and the consequences of resigning.

The final three factors listed in Hargray present a closer question. It is true that Monahan likely felt pressure to make a quick decision on the evening of August 28, given the impending publication of the *Boston Globe* article. It is also true that he offered his resignation without first speaking to counsel or having the ability to choose when the resignation would become effective. However, a resignation is not necessarily involuntary merely because the plaintiff "was forced to make an unpleasant decision in a short period of time, while he felt intimidated, without the advice of an attorney." Hargray, 57 F.3d at 1569. Indeed, the coerciveness of defendants' request that Monahan resign is reduced by the fact that the request was made by phone rather than in person.

Monahan was not physically confined to a room and told that he would not be able to leave until he resigned. Cf. Angarita v. St. Louis County, 981 F.2d 1537 (8th Cir. 1992). Instead, when Zwick requested Monahan's resignation, Monahan was in the kitchen of his own home. Monahan could have ended his conversation with Zwick at any time simply by hanging up the phone.

Furthermore, Monahan had approximately half an hour to consult with his wife and friends between the time

Eric Fehrnstrom and Shawn Feddeman first called him to discuss the *Boston Globe* story and the time Zwick called to request Monahan's resignation.[16] He also could have asked for more time to consider the matter. And he surely could have taken advantage of having direct access to the Governor that evening to argue against resignation.

Under these circumstances, the Court concludes that Monahan voluntarily agreed to resign as chairman of the Civil Service Commission.

B. Even Assuming That Monahan Did Not Voluntarily Resign, Defendants must Prevail Because They Afforded Him Due Process.

As explained above, the Court's finding that Monahan voluntarily agreed to resign is sufficient to dispose of this case. However, the Court will also consider the implications of the alternative finding that Monahan did not voluntarily resign. Even assuming that he did not voluntarily agree to resign, Monahan has not proven that defendants deprived him of a protected property or liberty interest without due process of law.

As stated above, Monahan clearly had a protected property interest in his position as chairman of the Massachusetts Civil Service Commission. Thus, he could not be removed from his office without notice and an opportunity for a pre- and post-termination hearing. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542, 545-46 (1985). In this case, however, Monahan was afforded all of the process that he was constitutionally due.

1. Defendants Afforded Monahan Adequate Pre-termination Process.

Under Loudermill, "a very limited hearing prior to termination [is] sufficient" to satisfy the requirements of the Due Process Clause, "provided that it [is] followed by a more comprehensive post-termination hearing." O'Neill v. Baker, 210 F.3d 41, 48 (1st Cir. 2000) (citing Loudermill, 470 U.S. at 545-46). The hearing "need only include oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to tell his side of the story." Gilbert v. Homar, 520 U.S. 924, 929 (1997).

Whatever the precise requirements of pre-deprivation process, there is no question that the conversations that Monahan had with Governor Romney and his staff on August 28, 2003, were sufficient.[17] Monahan had an opportunity to air the issue not only with the Governor's senior staff, but with the Governor himself. Loudermill plainly does not require a formal adversary hearing prior to termination. See Loudermill, 470 U.S. at 545. The appropriate amount of process is only that which serves as "an initial check against mistaken decisions -- essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." Id. at 545-46.

Here, Monahan was placed on notice of the charges against him during his initial conversation with defendants Fehrnstrom and Feddeman, and he subsequently received two "hearings" regarding his contemplated termination -- one at approximately 6:52 p.m. with Zwick, Fehrnstrom, and Tzitzon, and the

other at approximately 8:15 p.m. with Governor Romney himself. In these phone conversations, Monahan had the opportunity to discuss his real-estate transaction with Gennaro Angiulo and explain why he did not disclose the transaction in his employment application and why the transaction did not disqualify him from serving as chairman of the Civil Service Commission. Admittedly, these phone conversations were relatively brief and informal. However, given the post-termination remedies afforded to him under state law, the conversations were adequate to satisfy the constitutional requirement that Monahan be given an opportunity "to tell his side of the story" before being removed from office. Gilbert, 520 U.S. at 929; see also Hudson v. City of Chicago, 374 F.3d 554, 562-63 (7th Cir. 2004) (holding that submission of a memorandum outlining the employee's position or a single meeting with superiors may constitute adequate pre-deprivation process); Heinen v. Brewer, 171 F.3d 612, 614 (8th Cir. 1999) (holding that a hearing conducted on the day of a police lieutenant's termination satisfied the constitutional requirement for a pre-termination hearing); Powell v. Mikulecky, 891 F.2d 1454, 1458-59 (10th Cir. 1989) (reviewing cases and holding that an abbreviated, face-to-face meeting constituted an adequate pre-termination hearing in light of available post-termination remedies); Brasslett v. Cota, 761 F.2d 827, 836 (1st Cir. 1985) (holding that a fire chief who met with the town manager for one hour before being terminated was afforded ample pre-deprivation process); Hanton v. Gilbert, 842 F. Supp. 845, 853 (M.D.N.C. 1994) ("Even a simple telephone call offering an employee the opportunity to discuss a discharge may satisfy pre-termination hearing requirements.").

2. Defendants Afforded Monahan Adequate Post-termination Process.

Even if Monahan's phone conversations with the Governor and his staff were sufficient to satisfy the constitutional requirement of a pre-termination hearing, the Court must still consider whether the post-deprivation procedural mechanisms available to Monahan under state law were adequate to satisfy the demands of the Due Process Clause. See O'Neill v. Baker, 210 F.3d 41, 48 (1st Cir. 2000) ("[A] very limited hearing prior to termination [is] sufficient, *provided that it [is] followed by a more comprehensive post-termination hearing.*" (emphasis added)). Here, the remedies afforded to Monahan under Massachusetts law were more than sufficient to satisfy constitutional requirements.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 333 (1976)(quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). Based on the parties' submissions to the Court, it appears that Monahan had at least three ways of obtaining meaningful judicial review of his removal under Massachusetts law. First, Monahan likely could have obtained judicial review of his removal by petitioning for a writ of certiorari under Mass. Gen. Laws ch. 249, § 4, which provides: "A civil action in the nature of certiorari to correct errors in proceedings which are not according to the course of the common law, which proceedings are not otherwise reviewable by motion or by appeal, may be brought in the supreme judicial or superior court . . . ."

In Levy v. Acting Governor, 767 N.E.2d 66 (Mass. 2002), two members of the Massachusetts Turnpike Authority who were removed by the Governor under Mass. Gen. Laws ch. 30, § 9, successfully challenged their removal through this certiorari procedure. Since the government employees in *Levy* were able to obtain prompt review of their removal under Mass. Gen. Laws ch. 249, § 4, it would appear that Monahan also could have invoked the certiorari procedure to obtain judicial review of his removal.18 In Giglio v. Dunn, 732 F.2d 1133, 1134-35 (2d Cir. 1984), the Second Circuit considered a New York statute similar to Mass. Gen. Laws ch. 249, § 4, that addressed "an amalgam of the common law writs of certiorari to review, mandamus, and prohibition," and it held that the statute provided a government employee a constitutionally adequate means of raising his claim that his resignation was involuntary. Similarly, it appears that Mass. Gen. Laws ch. 249, § 4, afforded Monahan the right to a constitutionally sufficient hearing on his claim that he had been improperly removed from office without cause.

A petition for a writ of certiorari was not the only procedural mechanism available to Monahan under Massachusetts law to challenge his removal. Monahan also could have asserted his right to the chairmanship of the Civil Service Commission by seeking a declaratory judgment or writ of mandamus against his successor, John Guerin. Mass. Gen. Laws ch. 231A (declaratory judgments); Mass. Gen. Laws ch. 249, § 5 (writ of mandamus); see also Caples v. Sec'y of Commonwealth, 216 N.E.2d 102, 103 (Mass. 1966) ("Since the enactment of [Mass. Gen. Laws ch. 231A] the right to try title to office is not exclusively by

petition for writ of mandamus."). Not only were these procedural mechanisms *available* to Monahan, he actually *invoked* these remedies in an action filed against Guerin in Massachusetts superior court. See Compl., Monahan v. Guerin, MICV 2004-0195-B, ¶¶ 12-14 (Mass. Super. Ct. Jan. 16, 2004). In denying Monahan's motion for a preliminary injunction on the grounds that he had not demonstrated a likelihood of success on the merits of his claims, Monahan v. Guerin, MICV 2004-0195-B (Mass. Super. Ct. Jan. 27, 2004), the superior court judge did not question Monahan's right to bring his action under Massachusetts law. Instead, it was Monahan, not the court, who effectively closed the door on the potential remedies of mandamus and declaratory judgment by failing to prosecute his case after his motion for a preliminary injunction was denied. Monahan cannot "claim that [he] was denied due process just because [he] chose not to pursue remedies that were adequate." Veterans Legal Def. Fund v. Schwartz, 330 F.3d 937, 941 (7th Cir. 2003). Much like the plaintiffs in Veterans Legal Defense Fund, Monahan has failed to demonstrate that the post-deprivation remedies afforded by Massachusetts law -- including certiorari, mandamus, and declaratory judgment -- are inadequate to satisfy the requirements of the Due Process Clause. Thus, his claim that he was deprived of a protected property interest without due process of law must fail.

Finally, even if Monahan is correct that the remedies of certiorari, mandamus, and declaratory judgment were not available to him or were constitutionally inadequate, defendants are nonetheless entitled to qualified immunity because the unavailability or inadequacy of these remedies was not "clearly

established" at the time Monahan was removed from office. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Birkenholz v. Sluyter, 857 F.2d 1214, 1218 (8th Cir. 1988) (holding that defendants were protected by qualified immunity since a reasonable official in defendants' position could have concluded that a state statute provided an adequate post-termination remedy). No reasonable official in the defendants' position, having understood plaintiff to have effectively waived his rights to pursue any action by failing to take advantage of available statutory remedies, would expect that any further action was constitutionally required.

3. Defendants Did Not Deprive Monahan of a Protected Liberty Interest Without Due Process of Law.

In addition to claiming that defendants deprived him of a protected property interest in his position as chairman of the Civil Service Commission, Monahan also alleges that defendants deprived him of a constitutionally protected liberty interest by terminating his employment on the basis of false and defamatory media reports and rumors. *See* Compl. ¶¶ 46, 49. The Due Process Clause is violated when "a public-sector employer creates and disseminates a false and defamatory impression about an employee in connection with the employee's discharge" without first providing the employee with an opportunity to dispute the defamatory allegations in an adequate name-clearing hearing. Wojcik v. Mass. State Lottery Comm'n, 300 F.3d 92, 103 (1st Cir. 2002); see also Codd v. Velger, 429 U.S. 624, 627-28 (1977); Bd. of Regents v. Roth, 408 U.S. 564, 573 (1972). To establish a claim for

the deprivation of a liberty interest without due process, a government employee must satisfy five elements: (1) the alleged statements must charge the employee with conduct that might seriously damage his standing and associations in his community and undermine his good name, reputation, honor, or integrity; (2) the employee must dispute the charges made against him as false; (3) the stigmatizing statements or charges must have been intentionally publicized by the government; (4) the stigmatizing statements must have been made in conjunction with an alteration of the employee's legal status, such as the termination of his employment; and (5) the government must have failed to comply with the employee's request for an adequate name-clearing opportunity. Wojcik, 300 F.3d at 103.

Here, Monahan has almost certainly not met the third element -- intentional publication of defamatory statements by the government. The allegedly false and defamatory statements regarding Monahan's relationship with organized-crime figures were published by the *Boston Globe*, not the defendants. Defendant Shawn Feddeman, Governor Romney's press secretary, merely informed *Globe* reporter Frank Phillips that the Governor had accepted Monahan's resignation and that Monahan's past business relationship with Gennaro Angiulo had not been unearthed in the background check performed by the Governor's office. Frank Phillips, *New Head of Civil Service Resigns, Had Been Asked About a Loan from Mobster*, Globe (Boston), Aug. 29, 2003, at B1. It seems highly unlikely that Feddeman's limited statements to the press constituted the intentional publication of defamatory allegations. See Wojcik, 300 F.3d at 102-04

(holding that the publication requirement was not satisfied where defendants merely told the press that a state lottery commission employee was terminated "for violation of Lottery policies and procedures" in the face of media reports that the employee had stolen lottery tickets).

But even if defendants could be considered complicit in the formal dissemination of stigmatizing statements against Monahan, Monahan has not proved that defendants failed to provide him with an adequate opportunity to clear his name. As explained above, Monahan was afforded three opportunities to discuss the allegations in the *Globe* article with members of Governor Romney's staff and with Governor Romney himself on the evening of August 28, 2003.

In those conversations, Monahan attempted to allay defendants' concerns about his real-estate transaction with Angiulo by explaining that the transaction was done at arm's length on fair terms, had been completed decades ago, and had previously been aired in the local press. Furthermore, Monahan had the option of invoking the various post-termination procedural protections discussed above in Section IV.B.2 to contest his removal from office and thus clear his name of any stigma resulting from the removal. The Constitution requires no more. See Wojcik, 300 F.3d at 103 ("The purpose of the hearing is only to allow the employee to clear his name of the false charges; compliance with formal procedures is not necessarily required.").[19]

V. CONCLUSION

The Court empathizes with William Monahan. He lost a job of great importance to him and may have had his reputation tarnished as a result of what he believed was an overreaction to a newspaper article. Unfortunately, if Monahan is entitled to any remedy for his alleged injuries, it is not from this Court. Monahan voluntarily resigned on the evening of August 28, 2003. Even if he had not, Monahan was afforded all of the process he was constitutionally due. He simply has not proved that defendants are liable for violating his rights under the federal Constitution.

The defendants are directed to provide the Court with a form of judgment by September 10, 2009.

SO ORDERED.

Date: September 3, 2009
NANCY GERTNER, U.S.D.C.

Footnotes

1 The other officials named in the suit are: Eric Fehrnstrom ("Fehrnstrom"), the Communications Director; Shawn Feddeman ("Feddeman"), Press Secretary to the Governor; Spencer Zwick ("Zwick"), Deputy Chief of Staff to the Governor; and Nicholas Tzitzon ("Tzitzon"), Director of Appointments.

2 Actually, since Monahan replaced a commissioner who left his position, he was to serve the remaining 4.8 years of that term.

3 Monahan had also worked for Tufts New England Medical Center as its Director of Community Services

from 1970 to 1990, and during the same period, was an Associate Clinical Professor at the Tufts University School of Medicine. He developed programs for high-risk populations and helped train doctors and social workers in dealing with these populations.

4 At some point, Phillips called Fehrnstrom seeking a statement from him concerning Monahan's transactions with Angiulo.

5 Eric Fehrnstrom and Shawn Feddeman had earlier called Monahan at 6:02 p.m., reaching Monahan's wife and leaving a message. The two also called Spencer Zwick, Deputy Chief of Staff to the Governor, to inform him of the pending *Boston Globe* story and inquire whether Monahan had in fact been appointed to the Civil Service Commission. In addition, they called Nicholas Tzitzon to obtain a copy of Monahan's background questionnaire to see whether Monahan had disclosed the Angiulo transaction.

6 Monahan understood the reference to "Bulger" as a reference to a high profile organized crime case.

7 The record is clear that Romney's senior staff recounted some of the facts of the 1980 transaction, including who the parties were and that it had been concluded some time in the past. Romney did not know – or could not recall on the stand -- the specifics of the transaction: that the interest rate was a lawful one, that the mortgage had been paid off in 1989, that this had involved a partnership between Monahan and another individual, and that Monahan had sold his interest to his partner in either 1992 or 1993.

8 At about 6:46 p.m., Monahan called Joseph O'Donnell, a mutual friend of Monahan's and Romney's, thinking that O'Donnell could put Monahan in touch with Romney.

9 Paragraph 19 of the position statement asserts: "I informed the Governor that if I determined that it was in his best interest and in my best interest, that I would resign. At that point, he gave me a private number in order to get in further contact with him." Trial Exh. 4.

10 Although I do not have to address the question of damages, given my finding about liability, it is important to note that the record was wholly barren of provable economic damages. Such damages may well exist; the Court can only imagine the disruption that losing this job effected in Monahan's life, but Monahan simply made no effort to assemble the documentary and testimonial evidence to prove damages.

11 Monahan also sued the *Boston Herald* and the *Boston Globe* for defamation.

12 There does not appear to be any provision of Massachusetts law that would prohibit the governor from delegating his authority to accept a Civil Service Commissioner's resignation to one of his staff members. See, e.g., Martin v. City Manager of Worcester, 207 N.E.2d 364, 364 (Mass. 1965) (holding effective a resignation accepted by a city's commissioner of public works "at the request and direction of the city manager").

13 Even if Monahan did not explicitly say the words, "I will resign," his responses to defendants' requests that

he resign, including his talk about "taking one for the team" and his discussion with the Governor about finding work after his resignation, communicate the same thing in the way that an adoptive admission communicates a belief in the truth of the statement made to the witness. See Fed. R. Evid. 801(d)(2)(B).

14 Voluntariness is also a requirement of an effective resignation under Massachusetts common law. Campbell v. City of Boston, 151 N.E.2d 68, 70 (Mass. 1958). However, since the standard for voluntariness under Massachusetts common law is similar to the standard articulated in cases dealing with the Due Process Clause, the Court focuses on the federal constitutional standard. Compare Campbell, 151 N.E.2d at 70 (suggesting that a resignation is involuntary if procured through "fraud, compulsion or duress"), *with Stone*, 855 F.2d at 174 ("Inevitably, particular resignations have been found involuntary . . . in two circumstances: (1) where obtained by the employer's misrepresentation or deception, and (2) where forced by the employer's duress or coercion." (citations omitted)).

15 Although Monahan cites Levy v. Acting Governor, 767 N.E.2d 66 (Mass. 2002), as evidence that defendants could not have reasonably believed that he was removable under Mass. Gen. Laws ch. 30, § 9, Levy provides little support for Monahan's claim. Levy merely held that two members of the Massachusetts Turnpike Authority, which the Massachusetts Supreme Judicial Court emphasized is an "independent corporate body" and as such is "not part of the machinery of the government," could not be removed from office based on a difference of opinion with the governor over policy matters. Levy, 767 N.E.2d at 73, 75, 77; see also

Flomenbaum v. Commonwealth, 889 N.E.2d 423, 428 (Mass. 2008). Levy did not establish that a member of the Massachusetts Civil Service Commission may not be removed from office for failing to disclose in his employment application that he had previously entered into a real-estate transaction with a criminal figure that could give rise to negative press coverage and reflect poorly on the Commission.

16 In fact, Monahan's friend Dante Muzzioli appears to have been present in the kitchen with Monahan during his conversation with Zwick. Trial Tr. 94-97, April 22, 2009.

17 If Monahan did not in fact agree to resign on the evening of August 28, 2003, it is not exactly clear when his termination occurred. It is clear, however, that Monahan never returned to work after September 2, 2003. Thus, for purposes of distinguishing between pre- and post-termination process, this Court will assume that Monahan was terminated on the morning of September 2, 2003.

18 Monahan argues that he could not have obtained judicial review of his removal under Mass. Gen. Laws ch. 249, § 4, because unlike in *Levy*, where plaintiffs received a two-day hearing on their removal, Monahan was not afforded the type of "quasi-judicial proceeding" that could be reviewed via a writ for certiorari. Pl.'s Opp. to Defs.' Mot. to Dismiss 12 n.11. The Massachusetts Supreme Judicial Court has held that the "requisite elements for availability of certiorari are (1) a judicial or quasi judicial proceeding; (2) a lack of all other reasonably adequate remedies; and (3) a substantial injury or injustice arising from the

proceeding under review." Town of Walpole v. Sec'y of the Exec. Office of Envtl. Affairs, 537 N.E.2d 1244, 1247 (Mass. 1989) (quoting Boston Edison Co. v. Bd. of Selectmen of Concord, 242 N.E.2d 868, 871 (Mass. 1968)). However, given the Supreme Judicial Court's decision in *Levy*, it would appear that a governor's decision to remove a public official under Mass. Gen. Laws ch. 30, § 9, is a "quasi-judicial" act subject to review through the certiorari procedure. At a minimum, an official in defendants' position could reasonably have believed, in light of *Levy*, that Monahan could seek review of his removal through a petition for a writ of certiorari.

19 To the extent that "Claim Six" of Monahan's complaint alleges that defendants conspired to deprive him of civil rights protected by the Constitution, this claim must fail because the Court has concluded that Monahan suffered no deprivation of his rights under the Due Process Clause. See Earle v. Benoit, 850 F.2d 836, 844 (1st Cir. 1988) ("[F]or a conspiracy to be actionable under section 1983 the plaintiff has to prove that 'there [has] been . . . an actual deprivation of a right secured by the Constitution . . . ." (quoting Landrigan v. City of Warwick, 628 F.2d 736, 742 (1st Cir. 1980))).